

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   GEORGE J. TENET, INDIVIDUALLY, :

4    PORTER J. GOSS, DIRECTOR OF   :

5    CENTRAL INTELLIGENCE AND       :

6    DIRECTOR OF THE CENTRAL       :

7    INTELLIGENCE AGENCY, AND       :

8    UNITED STATES,                :

9                   Petitioners       :

10           v.                       :   No. 03-1395

11   JOHN DOE, ET UX.               :

12   - - - - -X

13                                   Washington, D.C.

14                                   Tuesday, January 11, 2005

15                   The above-entitled matter came on for oral

16   argument before the Supreme Court of the United States at

17   11:07 a.m.

18   APPEARANCES:

19   PAUL D. CLEMENT, ESQ., Acting Solicitor General,

20           Department of Justice, Washington, D.C.; on behalf of

21           the Petitioners.

22   DAVID J. BURMAN, ESQ., Seattle, Washington; on behalf of

23           the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	3
5	DAVID J. BURMAN, ESQ.	
6	On behalf of the Respondents	26
7	REBUTTAL ARGUMENT OF	
8	PAUL D. CLEMENT, ESQ.	
9	On behalf of the Petitioners	50
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
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P R O C E E D I N G S

(11:07 a.m.)

JUSTICE STEVENS: We'll now hear argument in the case of Tenet against John Doe.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Justice Stevens, and may it please the Court:

This case, like the Totten case almost 130 years ago, is at bottom an effort by alleged spies to obtain additional compensation for services rendered.

JUSTICE O'CONNOR: Now, do you take the position that the Federal Government couldn't enforce any provision of such an agreement either?

MR. CLEMENT: That's correct. That's correct, Justice O'Connor, with respect to the kind of espionage arrangements and contracts we're talking about.

JUSTICE O'CONNOR: Well, suppose -- suppose somebody, allegedly a former spy, is alleged to -- by the Government to have breached the agreement by writing and publishing a tell-all book about it.

MR. CLEMENT: Well, Justice O'Connor, I think that actually points up the important differences between the way that the CIA deals with its employees and the way

1     that it deals with its espionage agents like respondents  
2     are alleged to be.

3                 JUSTICE O'CONNOR:   Yes, okay.

4                 MR. CLEMENT:   With respect to espionage  
5     agents --

6                 JUSTICE O'CONNOR:   Would the Government be  
7     without any recourse if it was an alleged espionage agent?

8                 MR. CLEMENT:   I believe that's true, Justice  
9     O'Connor, because the espionage agents do not sign  
10    prepublication review agreements.  They do not receive  
11    formal security clearances the way that an employee does.  
12    And unlike an employee, they do not have access to a broad  
13    swath of classified information that raises attendant  
14    counterintelligence concerns.  And so if you think about  
15    the course of dealing that the agency has with its  
16    employees, the employees are able to sue the agency in  
17    court under, for example, title VII, and the agency can  
18    turn around and sue their employees to enforce things like  
19    the prepublication review agreement that was issue -- at  
20    issue in this Court's *Snepp* decision.  So in the  
21    employment context, I think it's very difficult to say  
22    that there's an implied term of the employment contract  
23    that either side will not have judicial recourse.

24                JUSTICE STEVENS:   But what if the employment  
25    contract is with an American citizen to act as an

1 espionage agent and nobody else knew about it. Would --  
2 would that -- would he be treated as an espionage agent or  
3 as an employee?

4 MR. CLEMENT: If I understand your hypothetical,  
5 Justice Stevens, I think that individual would be treated  
6 as an espionage agent if it's just somebody for sort of a  
7 one-off assignment.

8 And I think that -- that is illustrated by this  
9 Court's decision in Totten. I mean, William Lloyd, for  
10 example, was a U.S. citizen. He agreed with President  
11 Lincoln to engage in espionage activities in the south.  
12 And this Court held that when the estate of -- of Mr.  
13 Lloyd came to seek compensation from a court, that there  
14 was no judicial remedy to enforce that alleged agreement,  
15 and the remedy, if any, lay with the President's  
16 contingent fund.

17 JUSTICE KENNEDY: I -- I'd like your help on  
18 this. Your interpretation of Totten -- does it say that  
19 there is just no actionable contract, or does it say  
20 there's no jurisdictions like political question? I mean,  
21 you win under any of those theories, if we accept them.  
22 But which is it?

23 MR. CLEMENT: Well, Justice Kennedy, it's a  
24 difficult question to answer because I think there are a  
25 lot of different strains underlying the Totten decision,

1 and I think there is --

2 JUSTICE O'CONNOR: Yes, but you need to get to  
3 whether there is -- do you urge dismissal for lack of  
4 jurisdiction in the district court or a dismissal on the  
5 merits? It's not clear to me at all.

6 MR. CLEMENT: Well, Justice O'Connor, I think  
7 it's better understood as simply a rule of dismissal, that  
8 it's not really a pure jurisdictional defect. It's been  
9 referred alternatively as a jurisdictional bar or as a  
10 rule of dismissal, and of course, as this Court reminded  
11 us recently in the Kontrick decision, people tend to use  
12 terms like jurisdiction loosely in these contexts.

13 JUSTICE KENNEDY: Well, I'm -- I'm not going  
14 away with a clear idea of your position.

15 MR. CLEMENT: Well --

16 JUSTICE KENNEDY: Do I -- do I -- does the  
17 Government file under 12(b)(1) like a jurisdiction,  
18 12(b)(6), no cause of action? Of course, you'd probably  
19 do both, but I -- I want to know --

20 MR. CLEMENT: Well --

21 JUSTICE KENNEDY: -- what your best thinking is  
22 of what Totten means. It seems to me that this just means  
23 that there can be no contract formed under these  
24 circumstances.

25 MR. CLEMENT: Justice Kennedy, I think the

1 general practice of the Government is to file under both.  
2 I believe that's what happened here. I think the fact  
3 that we file under both suggests that there is a little  
4 bit of confusion about it. I would tend to agree with you  
5 it's better understood as a rule of dismissal under  
6 12(b)(6) because if you think about the Totten decision,  
7 there's really two strains to the decision.

8           One is a recognition that the claim to relief  
9 necessarily depends on a fact that the law has always  
10 regarded as secret, and in a sense that case simply can't  
11 proceed. And that's very analogous to this Court's  
12 holding in Weinberger against Catholic Action.

13           There's a second strain to the case, though, and  
14 that is that the very idea of walking into court and  
15 filing the action is inconsistent with an implied term of  
16 the contract or, indeed, the whole nature of the espionage  
17 relationship. And I think particularly if you emphasize  
18 that second strain of the Totten decision, I think it's  
19 better understood as a 12(b)(6) dismissal because what  
20 you're really saying is somebody is walking into court and  
21 they are effectively pleading themselves out of court  
22 because as -- if you look at this complaint here, it  
23 starts out with a recitation of the fact that these  
24 individuals allegedly engaged in espionage activities and  
25 that they were denied certain promises that were made to

1     them after they carried out, quote, their end of the  
2     bargain.

3                 JUSTICE KENNEDY:  If there's no cause of action,  
4     there's nothing to -- to claim on, what's -- what's the  
5     closest analogy?  Is it like a promise to make a gift,  
6     which is unenforceable?  Is there kind of a contract  
7     analogy that we can use?

8                 MR. CLEMENT:  I -- I mean, I -- you know, one --  
9     one way of thinking about it, but I think it's a very  
10    rough analogy, is it's almost like an unlawful contract.  
11    It's a contract that the law just doesn't recognize.  And  
12    I think that -- that reflects the underlying reality of  
13    these cases, which is there is something inherent in an  
14    espionage relationship that when you enter an espionage  
15    relationship, you understand that you have no protected  
16    status under the law.

17                I think that has, with respect, been clear in  
18    the -- not just in the Totten decision but from the very  
19    beginning of the republic.  I mean, ever since Nathan Hale  
20    agreed to cross British lines as a spy, it was understood  
21    that he had no legal recourse, that he had a status that  
22    was not recognized in the law.  And I think that is -- it  
23    has always been thus, and I think there is no reason to  
24    revisit the --

25                JUSTICE STEVENS:  Does -- does that mean -- the



1 no legal recourse at all mean that you could torture an  
2 agent if you were dissatisfied with his work performance?

3 MR. CLEMENT: I -- I don't believe that's true,  
4 Justice Stevens, and what I would distinguish is between a  
5 constitutional claim that an -- an agent -- an alleged  
6 agent might have that doesn't depend on the espionage  
7 relationship. As I would understand your question, I  
8 mean, it would -- there would be a -- a substantive due  
9 process claim that anybody could bring if the Government  
10 tortured them. They wouldn't have to allege that I had a  
11 secret espionage relationship with the Government and then  
12 they tortured me. That would be irrelevant to their  
13 claim.

14 JUSTICE SCALIA: Could I -- could I bring your  
15 back to your -- your earlier discussion of a spy who is  
16 also a -- a Government employee? Are you telling me that  
17 he -- he cannot sue for his regular salary simply because  
18 the work he was doing was -- was espionage? I mean, he's  
19 -- he's a GS-whatever, GS-16, and the Government just  
20 doesn't send him his monthly check.

21 MR. CLEMENT: Well, Justice --

22 JUSTICE SCALIA: He has no recourse for that  
23 check just because he's been doing spy work?

24 MR. CLEMENT: No, that's not the position, and  
25 -- and I -- and I apologize if I gave that impression in

1     answering Justice Stevens' hypothetical. I understood to  
2     be the hypothetical that you had a Government employee who  
3     engaged in a separate spy endeavor, if you will, and then  
4     tried to sue to collect on the damages owed under that --  
5     for that particular endeavor.

6             JUSTICE SCALIA: Okay, not -- not for his  
7     regular GS salary.

8             JUSTICE STEVENS: No. My -- my hypothetical was  
9     an individual who's not a Government employee but is hired  
10    by the Government to engage in espionage activities.

11            MR. CLEMENT: Exactly. And as I indicated to  
12    you earlier, Justice Stevens -- but in a sense that's not  
13    a hypothetical. That's the Totten decision itself.  
14    William Lloyd was -- or at least alleged that he was  
15    employed by President Lincoln to engage in those services.  
16    And in answer to Justice Scalia's question, if William  
17    Lloyd happen to be an employee of the -- of the  
18    Comptroller of Currency or something, he could still sue  
19    to get whatever remedies he had --

20            JUSTICE SCALIA: He couldn't get the 5,000 bonus  
21    for being a spy. Right?

22            MR. CLEMENT: That's exactly right. No bonus  
23    dollars for being a spy under those circumstances.

24            JUSTICE GINSBURG: Could you clarify on the  
25    employment question something else? It's -- it's in your

1     reply brief and you say you're contrasting this type of  
2     claim with a title VII claim which -- in which you say  
3     that the Court in Webster relied on the CIA's historical  
4     practice of litigating employment disputes. The CIA's  
5     historical practice, not the Court's rulings. Are you  
6     suggesting that even with respect to employment  
7     litigation, it's up to the CIA to decide what its practice  
8     will be?

9             MR. CLEMENT: I don't think so, Justice  
10     Ginsburg, but the point is that the reason that -- that I  
11     think that the Government would have had almost no ability  
12     to invoke a Totten-type defense in Webster or in a title  
13     VII case is because of its course of dealing with its  
14     employees. And I suppose that if the agency completely  
15     changed its course of dealing with respect to its  
16     employees or entered a very different course of dealing  
17     with certain select employees, then a Totten defense might  
18     become available in those circumstances.

19             But as I indicated earlier, I think if you look  
20     at the overall nature of the agency's relationship and  
21     rights vis-a-vis its employees, even its covert ones,  
22     that's a very different relationship than the agency has  
23     with respect to espionage agents. And again, that's  
24     because they enter contracts with them. Each side has  
25     certain litigation rights, and I think it would be a bit

1 of a stretch for the Government to come in and say that  
2 there's an implied term of that employment agreement that  
3 forecloses a judicial remedy.

4 JUSTICE GINSBURG: May I --

5 JUSTICE SCALIA: I guess the Government can't  
6 enforce -- cannot enforce these contracts either. Right?  
7 I mean, you take the good with the -- the bad with the  
8 good?

9 MR. CLEMENT: That's exactly right, Justice  
10 Scalia.

11 JUSTICE SCALIA: You've never sued a spy to --  
12 who hasn't carried out his mission?

13 MR. CLEMENT: Certainly not -- I'm not aware of  
14 such a suit, and I've been told by the agency that it's  
15 impossible. And I think it just reflects the nature of  
16 these agreements, and it does -- it --

17 JUSTICE GINSBURG: Can -- can we go back to the  
18 -- another threshold question? You did press below and  
19 Judge Tallman urged that the reason this case can't be in  
20 the district court in California, or wherever, is it has  
21 to be in the Federal Circuit. This is a contract claim  
22 against the Government. Are you abandoning that position?

23 MR. CLEMENT: Yes, Justice Ginsburg, in fact we  
24 have abandoned it. We abandoned that position at the cert  
25 stage. We made that clear to the Court in our certiorari

1 papers, and we don't renew any type of jurisdictional  
2 objection at this stage.

3 JUSTICE GINSBURG: Are you free -- are you free  
4 to abandon it? Is the -- is the Government's surrender of  
5 its immunity from suit for contracts, provided that the  
6 suit is brought in the Federal Circuit -- is that  
7 something that you are free -- Congress having said that,  
8 that the executive is free to say, well, we could take  
9 advantage of that, but we don't want to?

10 MR. CLEMENT: Justice Ginsburg, I think the  
11 answer to that is that it probably is jurisdictional in  
12 the pure sense and so if this Court disagreed with our  
13 view that there wasn't a Tucker Act problem, this Court  
14 could reach that issue and send the case back on the  
15 Tucker Act grounds. So maybe I could explain to you why  
16 it is that we think that there's not a Tucker Act problem,  
17 at least at this stage of the litigation.

18 The Ninth Circuit's reasoning on this was a  
19 little bit oblique, but as I understand it, there were two  
20 parts to it. First of all, that there might be some kind  
21 of substantive due process claim here that did not depend  
22 on the contract but rather somehow stemmed from the fact  
23 that there was some endangerment of these individuals and  
24 that gave rise to some substantive due process right. And  
25 even if that claim, as the Ninth Circuit recognized, is

1 not one that is formed on the contract or an implied  
2 contract, it seems to me that that's a claim that's  
3 clearly within the coverage of the Totten doctrine because  
4 it is inherent in the espionage relationship that the  
5 individual will be engaged in a -- in a situation where  
6 they will be endangered.

7           And I think that was certainly true of William  
8 Lloyd in the Totten case. When he crossed southern lines,  
9 he was very much endangered, and that's something that  
10 wasn't lost on President Lincoln. In footnote 3 of our  
11 opening brief, we have a quotation from President Lincoln  
12 about the inherent dangers of spies crossing lines and the  
13 need for secrecy to protect that.

14           So that's why I think that claim is properly  
15 understood as not being covered by the Tucker Act and not  
16 being required to be brought in the Court of Claims, but  
17 nonetheless a claim that is barred by the Totten doctrine.

18           The other point they made was with respect to  
19 the specific regulations that the agency has internally,  
20 and they suggest that there might be a claim here that was  
21 based on the regulations independent of the contract. But  
22 in order for that claim to go forward, the Court would  
23 have to examine the unredacted version of the regulations.

24           And even if the Court is right that there's a  
25 need for further proceedings on that question, it makes no

1 sense to interpret the doctrine in a way that requires the  
2 Government to wait to assert a Totten defense until there  
3 is a jurisdictional question cleared up that actually  
4 requires discovery because I think what Totten recognized  
5 is -- is there is a need to dismiss the claim at the  
6 outset before any discovery because of the nature of the  
7 suit.

8           So for those two reasons, we thought that the --  
9 that the better view was that the Tucker Act problem was  
10 either not presented because of the substantive due  
11 process claim or not ripe and that we would pursue the  
12 Totten act.

13           JUSTICE SCALIA: That -- that would make a lot  
14 of sense if you really felt that what Totten is is -- is a  
15 dismissal on the merits, just saying there's -- there's no  
16 contractual claim. I -- I mean, if you didn't believe  
17 that, if -- if you believed that what Totten says is we  
18 have no jurisdiction, then we'd have no problem and we  
19 could resolve all of the questions.

20           But it seems to me if you believe that Totten is  
21 based mainly -- you know, it's a contract case and said  
22 the contract is just totally invalid, we shouldn't be  
23 reaching the contract issue. We should simply say that if  
24 -- if we agree with you, that there's no substantive due  
25 process claim here and -- and no claim based on the

1 regulations.

2           How do we get the authority to decide the -- the  
3 contract question?

4           MR. CLEMENT: Well, I think whatever the status  
5 the contract question has, whether it's 12(b)(1) or  
6 12(b)(6), I think it's a -- it's a threshold issue and I  
7 think this Court under the Rohrgas authority can reach  
8 that issue at the outset. And I think it would be  
9 particularly perplexing to have a doctrine that said that  
10 when we have a suit that we know on the face of the  
11 complaint cannot be brought in any court, that we are  
12 going to not reach that issue in favor of trying to  
13 determine first which court it properly belongs in, when  
14 that inquiry in fact will get us into the exact classified  
15 information that we know at the outset the suit should not  
16 involve in the first place. And I think there is enough  
17 flexibility in this Court's Rohrgas decision to allow the  
18 Court to reach that threshold question first.

19           JUSTICE KENNEDY: And you're saying that if  
20 there's no contract, then there's no substantive liberty  
21 to protect under the -- under due process procedures.

22           MR. CLEMENT: I -- I think that follows, Justice  
23 Kennedy. I think one of the difficulties with the  
24 constitutional theory that's advanced on the other side is  
25 it gives -- it seeks a right to enforce internal



1 procedural handling mechanisms for claims that we know  
2 there's no legitimate expectation for their enforcement at  
3 all. And it seems odd that this would develop in a way  
4 where the procedural rights somehow trump the substantive  
5 rights, and we know from Totten that there is no substance  
6 here that can be brought forward in the courts.

7 I think in this respect it is also important to  
8 recognize that, as a practical matter, an agent who's  
9 negotiating in the shadow of the Totten decision and the  
10 broader understanding that Totten reflects is likely to  
11 seek assurances not just about compensation but about how  
12 -- how their claims would be heard by the CIA and how  
13 they're going to get their compensation. And I think  
14 there's no particular reason to think procedural  
15 assurances should be judicially enforceable when the  
16 substantive assurances are not.

17 Now, one other point to make about the nature of  
18 these agreements. Not only because of the nature of these  
19 agreements does the agency end up in a position where it  
20 cannot enforce these contracts itself through judicial  
21 actions, but it also ends up in a situation where it may  
22 have to give up-front payments that it otherwise wouldn't  
23 have to give and the like. So there are consequences to  
24 both sides of dealing in this way with these espionage  
25 relationships as effectively outside the law. But again,

1 it has always been thus, and I think there is no principle  
2 in -- in any recent development that requires this Court  
3 to revisit the rule of Totten which, as I said, suggests  
4 an -- it reflects an understanding that date backs --  
5 dates back much further.

6           If I can make one other point, which is I think  
7 even though the Totten decision reflects something more  
8 than the state secrets privilege, because there's a more  
9 fundamental defect with a suit that's premised on an  
10 espionage agreement than just the fact that it tends to  
11 compromise secret information, it is true that applying  
12 the Totten rule of dismissal does provide a clear  
13 mechanism that protects confidential information.

14           And I would analogize it to this Court's  
15 decision in *Snepp* where the Court adopted a constructive  
16 trust arrangement. The Court adopted that arrangement  
17 where -- where an employee who violated a -- a  
18 prepublication review agreement had to turn over all the  
19 proceeds to the Government. And -- and the Court adopted  
20 that remedy in favor of a damages remedy, and the Court  
21 did so to send a clear signal to the employees that there  
22 is no incentive whatsoever to violate the terms of these  
23 agreements. In the same way, having a clear rule of  
24 dismissal sends a clear message to espionage agents that  
25 there's no point in even bothering to file the suit in the

1 first place. It will simply be dismissed.

2 JUSTICE SCALIA: Mr. Clement, the --

3 JUSTICE STEVENS: Mr. --

4 JUSTICE SCALIA: Go ahead. I'm sorry.

5 JUSTICE STEVENS: I just wanted to ask one. I  
6 don't remember whether the briefs discuss it or not, but  
7 is there a statute that prohibits the disclosure of secret  
8 agents like this and does that -- if so, does that have  
9 any relevance to this case?

10 MR. CLEMENT: Justice Stevens, there is such a  
11 statute. There's a statutory provision that gives the  
12 authority. It had been with the -- with the Director of  
13 Central Intelligence. The recent Intelligence Reform Act  
14 has transferred it to the Director of National  
15 Intelligence. But it gives a requirement that the -- that  
16 -- that the director protect sources and methods. I think  
17 that that -- that statutory provision is consistent with  
18 the general notion behind the Totten doctrine, but I don't  
19 think it's --

20 JUSTICE STEVENS: And does the statute impose a  
21 penalty on anyone for revealing the name of a secret  
22 agent?

23 MR. CLEMENT: I don't think it -- it certainly  
24 doesn't impose any kind of monetary penalty. There are,  
25 under certain circumstances, criminal penalties for the

1 disclosure of classified information, but I think that  
2 the --

3 JUSTICE STEVENS: But is the identity of an  
4 agent a -- a type of classified information protected by  
5 the statute?

6 MR. CLEMENT: I think it is. It's protected  
7 both by the sources and method provision, and I think  
8 revelation of a source could implicate the -- the criminal  
9 prohibitions in the statute as well. And I think that  
10 this statute -- I think you can see the extent to which  
11 this -- this case implicates the core of the secrets that  
12 the agency has. This Court in the Sims case described the  
13 sources and methods protected by the statute as the heart  
14 of the intelligence community.

15 JUSTICE SCALIA: Mr. Clement --

16 MR. CLEMENT: And this case involves both.

17 JUSTICE SCALIA: -- the -- the argument made by  
18 the other side, which seems to me has some plausibility to  
19 it, is that Totten was decided in an age when courts were  
20 not as flexible as they are today. We -- we have  
21 procedures for matters being kept confidential by courts.  
22 We -- we allow hearings that are closed in matters that  
23 never would have been done before. And since, the  
24 argument goes, the -- the only purpose of Totten was to  
25 preserve the secrets, why can't we preserve the secrets

1     that way?  If and when it turns out that the prosecution  
2     of this -- of this suit would require a secret to be  
3     disclosed, we will terminate it or -- but -- but up until  
4     then, why -- why decide in advance?  Why not take a --  
5     take a run at it and see?

6                 MR. CLEMENT:  Well, Justice Scalia, there's a  
7     couple of points to be made about that.

8                 One, as this Court recognized in Reynolds -- in  
9     the Reynolds state secrets context itself, even the  
10    provisions of going forward, no matter what innovations  
11    have been made, the -- the provisions of going forward and  
12    handling classified information necessarily involve risks  
13    that the information will be disclosed.

14                In the first place, both Totten and the state  
15    secrets privilege itself are premised on the notion that  
16    the information, if it is in fact privileged, is withheld  
17    from the case.  It's an absolute privilege.  So the idea  
18    is not that you have some sort of limited disclosure to  
19    the court personnel and to the ultimate fact-finder in the  
20    case and that's somehow all consistent with the state  
21    secrets privilege.  To the contrary.  Once a determination  
22    is made that a matter is state secrets, there's no further  
23    disclosure of the information.  You -- the whole premise  
24    of state secrets is not that you try to prevent ultimate  
25    disclosure to the general public.  It's that once

1 something is privileged, you -- you treat the matter as  
2 privileged and you take it out of the case.

3 JUSTICE GINSBURG: But you're not making that  
4 statement with respect to anything that's classified.  
5 There was something in your brief, reply brief, at 18 and  
6 19 in which you -- you cite Reynolds and you say the  
7 proper response to classified information in civil  
8 litigation is to disregard the classified information, not  
9 to order partial disclosure to court personnel. Are --  
10 are you saying then in all of civil litigation if  
11 information is classified, then it's just out of the case?

12 MR. CLEMENT: Justice Ginsburg, I think there  
13 can be certain arrangements in certain civil litigation  
14 where the Government can agree with a party to proceed --  
15 as part of their overall agreement, to proceed on the  
16 basis of classified information, but that would involve a  
17 very different way of -- of proceeding than the normal  
18 default rules. And I think absent some kind of agreement  
19 for the Government to proceed in that way, the default  
20 rule in civil litigation has always been that the  
21 privilege is just that. It's -- the matter is -- the  
22 matter is privileged and it's taken out of the case.

23 JUSTICE SCALIA: But you lose. I mean, if -- if  
24 that matter is necessary for your case, don't -- don't you  
25 lose?

1           MR. CLEMENT: Absolutely not, Justice Scalia,  
2 not in civil litigation. And that's why the state secrets  
3 privilege is, I mean, quite a remarkable doctrine in the  
4 civil side of the case.

5           JUSTICE SCALIA: You're talking about civil  
6 only.

7           MR. CLEMENT: Only civil.

8           JUSTICE SCALIA: I'm thinking of gray mail.  
9 Certainly in the criminal -- criminal area, that isn't the  
10 case.

11          MR. CLEMENT: That's exactly right, Justice  
12 Scalia.

13          JUSTICE SCALIA: You either cough it up or you  
14 lose.

15          MR. CLEMENT: Right, and a different bargain has  
16 been reached in the criminal context, and in that context  
17 to ameliorate the consequence of the sometimes difficult  
18 choice of revealing classified information or proceeding,  
19 the Congress has come through with the Classified  
20 Information Procedures Act. That only applies in the  
21 criminal side, though.

22          JUSTICE BREYER: I just want to ask one  
23 question. Don't they have a claim interpreted favorably  
24 to them that this has nothing to do with a contract,  
25 totally nothing? Okay? But there happen to be some rules

1 over there in the CIA in their books somewhere, which  
2 we've never read, and they say when we use a foreign  
3 person as a spy, we'll pay him some money or we give him  
4 something. We have some procedures. Now, we don't have  
5 to do that as a matter of contract. We don't have to do  
6 it at all, but we do it. And so there's a claim here that  
7 we want to see that they're following their own rules.  
8 They say Totten doesn't apply to that because Totten is  
9 about contracts. Our claim isn't about contracts.

10 MR. CLEMENT: Justice Breyer, I have two  
11 responses to that. The first is I think the -- that the  
12 Totten doctrine extends more broadly than just the narrow  
13 confines of the contract.

14 JUSTICE BREYER: But it doesn't extend to torts,  
15 does it?

16 MR. CLEMENT: I would -- I mean, I would need a  
17 specific hypothetical. I can't imagine a tort that by its  
18 nature --

19 JUSTICE BREYER: Oh, you go --

20 MR. CLEMENT: -- depends on the relationship.

21 JUSTICE BREYER: You go ahead. You go ahead.

22 MR. CLEMENT: I can't imagine a tort that  
23 depends on its very nature on the relationship.

24 But we're talking about regulations that, as I  
25 understand the other side's allegations, are regulations



1 for handling secret contracts. So unless one can allege  
2 that they were a party to a secret contract or at least a  
3 secret relationship, there's no point in that individual  
4 even being in a position -- they wouldn't even have  
5 standing to challenge the regulation.

6 JUSTICE BREYER: So -- so you're saying if in  
7 fact, when you look at those allegations, they're about  
8 regulations for handling secret contracts, it's about a  
9 contract, but if there were to be an allegation that has  
10 nothing to do with the contract at all, it's just a way we  
11 handle retired foreign spies, Smiley for example, or  
12 someone like that. It has nothing to do with it, you see.  
13 Then could they -- what would be the rules then?

14 MR. CLEMENT: I still think the answer would be  
15 that there would be no relief under that circumstance  
16 because their -- their -- still their claim to having any  
17 entitlement under those rules at all would -- I mean, you  
18 know, total strangers don't have rights under those  
19 regulations. Alleged spies would have rights under those  
20 regulations, and the very idea of walking into court and  
21 asserting your rights as an alleged spy is inconsistent  
22 with the entire relationship and the contract that gave  
23 rise to it.

24 I would also point you to the Weinberger  
25 decision, Weinberger against Catholic Action, because

1     there this Court applied Totten to not force the Navy to  
2     produce an environmental impact statement even though  
3     there were regulations on the book -- and the concurring  
4     Justices focused on those regulations -- where the  
5     Department of Defense said we do produce an environmental  
6     impact statement even if it's classified. So I think on  
7     the authority of Weinberger as well, the very fact that  
8     there are internal regulations on a subject, the entire  
9     subject matter of which is secret, doesn't give rise to  
10    judicially enforceable rights.

11                 If there are no further questions, I'd like to  
12    reserve the time for rebuttal.

13                 JUSTICE STEVENS: Mr. Burman.

14                 ORAL ARGUMENT OF DAVID J. BURMAN

15                 ON BEHALF OF THE RESPONDENTS

16                 MR. BURMAN: Justice Stevens, and may it please  
17    the Court:

18                 First, with respect to the question about the  
19    due process rights below, I would note that the Government  
20    does not challenge, and specifically said so in footnote 2  
21    of the petition for cert and footnote 1 in their brief on  
22    the merits, whether there is a due process claim here. I  
23    would encourage you -- and I will come back to the due  
24    process question if you're interested.

25                 I'd encourage you to look at the respondents'

1 appendix, pages 72 to 74, where the CIA employee described  
2 the fact that there are, in fact, regulations that are not  
3 limited to enforcing a secret contract. That is not our  
4 claim.

5 JUSTICE SOUTER: But they are regulations that  
6 the -- that depend upon the existence of a spy-principal  
7 relationship --

8 MR. BURMAN: Actually we don't believe that's  
9 correct, Your Honor. We believe that --

10 JUSTICE SOUTER: Well, are you claiming that  
11 your -- your people are -- were not spies?

12 MR. BURMAN: We allege that they were coerced  
13 into that relationship, but we do --

14 JUSTICE SOUTER: Well, however got there --

15 MR. BURMAN: Correct.

16 JUSTICE SOUTER: -- they -- they -- your claim  
17 is that they're spies and that, therefore, whatever your  
18 procedural claims may be, whatever your substantive due  
19 process rights may be, as I understand it, depends upon  
20 the assumption of a spy-principal relationship.

21 MR. BURMAN: We do not agree with that, Your  
22 Honor.

23 JUSTICE SOUTER: Why?

24 MR. BURMAN: We believe that PL-110 allowed the  
25 admission of people essential to the United States without

1 any comment on whether they had formerly been spies and  
2 that these regulations do not require us to prove as an  
3 essential element even to the CIA, much less to the  
4 district court --

5 JUSTICE SCALIA: You --

6 MR. BURMAN: -- that they were spies for the  
7 CIA.

8 JUSTICE SCALIA: -- you don't have to prove that  
9 they were spies, but you have to prove that -- that they  
10 had a contractual relationship with the United States.  
11 And the only contractual relationship you're asserting is  
12 the relationship of a spy.

13 MR. BURMAN: We disagree with that, Your Honor.

14 JUSTICE SCALIA: Oh --

15 MR. BURMAN: We do not believe -- and in fact,  
16 the Ninth Circuit went out of its way to make very clear  
17 to the district court that if we try to plead around and  
18 base a claim on a contract, the district court should  
19 dismiss that.

20 JUSTICE SCALIA: Now, wait. What -- what is the  
21 basis on which you assert these regulations are applicable  
22 to you --

23 MR. BURMAN: We --

24 JUSTICE SCALIA: -- to your client?

25 MR. BURMAN: -- we say that the -- we believe we

1 can show, once we are allowed to proceed -- and it's  
2 premature at this time to decide whether we'll be  
3 successful in this or not. We believe we can show that  
4 the CIA has internal regulations that say as to PL-110  
5 resettles, we will provide continued financial and  
6 security support in these circumstances, a need-based  
7 standard.

8 JUSTICE SCALIA: And -- and the agency comes in  
9 and says, prove that you're a PL-110 resettlee.

10 MR. BURMAN: The agency --

11 JUSTICE SCALIA: And -- and what is your  
12 response to that?

13 MR. BURMAN: The agency has never --

14 JUSTICE SCALIA: Your response is I was  
15 resettled because I was a spy.

16 MR. BURMAN: No. We don't have to say that. We  
17 can say we were resettled under PL-110, which they have to  
18 inform at the time the INS Commissioner that they were  
19 bringing in people as PL-110 resettles. They're not  
20 required to tell the INS Commissioner that they were  
21 spies, just that they're essential.

22 JUSTICE SOUTER: What if -- what if the  
23 Government takes a slightly different tack and -- and you  
24 bring your essentially PL-110 neutral claim, and the  
25 Government says, the only relationship upon which this

1 claim can be based by these particular Does is a spy  
2 relationship? We claim privilege, and on the basis of  
3 that privilege, we -- we claim dismissal. What is your  
4 response to that?

5 MR. BURMAN: If that were an essential element  
6 of our claim, which we believe it is not --

7 JUSTICE SOUTER: Well, they're not saying it's  
8 an essential element in the sense that only a spy can make  
9 a 110 claim. They're saying that the only basis upon  
10 which you can make a 110 claim is the spy relationship.  
11 You have no other. How do you respond to that?

12 MR. BURMAN: Hence the reason we brought the  
13 case as Does. A procedure that was not known for that  
14 purpose at the time of Totten, that their own information  
15 officer and their brief and their position in Webster  
16 admits preserves the identity, preserves the secret. They  
17 acknowledge --

18 JUSTICE SOUTER: But, look, you're talking about  
19 procedural means. I want to know what your immediate  
20 response to their claim of privilege is. Are you going to  
21 say we weren't spies?

22 MR. BURMAN: The advantage of the Reynolds  
23 procedure is if they had made the claim of privilege, we  
24 would know what they were claiming was privileged.

25 JUSTICE SOUTER: They are making the claim of

1 privilege on the ground that the only basis for your 110  
2 claim is or can be, on facts known to them, that your  
3 clients were spies. Do you respond by saying, yes, we  
4 were spies, or do you respond by saying, we weren't spies?

5 MR. BURMAN: We respond by saying we have an  
6 entitlement to a fair process within the agency, a  
7 confidential process --

8 JUSTICE SOUTER: Let's assume that you have a  
9 really obnoxious court --

10 (Laughter.)

11 JUSTICE SOUTER: -- that wants a substantive  
12 response, do you respond by saying they're right, we're  
13 spies, or they're wrong, we weren't spies?

14 MR. BURMAN: If their position is that they  
15 can't confirm or deny to the district court whether we  
16 were spies --

17 JUSTICE SOUTER: They are claiming a privilege  
18 on the grounds that the only basis for your claim can  
19 possibly be the spy relationship based on facts known to  
20 them. In order to defeat that privilege, you've got at  
21 least to start by saying, no, we weren't spies and we  
22 don't claim to be. Are you going to say that or aren't  
23 you?

24 MR. BURMAN: We are not going to say we were not  
25 spies. We are going to --

1 JUSTICE SOUTER: Then I don't know why you're  
2 not out of court on Totten.

3 MR. BURMAN: Because we are not claiming the  
4 benefit of a bargain to be a spy. We are not seeking  
5 compensation --

6 JUSTICE BREYER: What is a PL --

7 JUSTICE SOUTER: You are -- you are --

8 JUSTICE BREYER: What is a PL-110 settlee?

9 MR. BURMAN: A PL-110 resettlee allowed the CIA  
10 and the FBI to bring in up to 100 people per year that  
11 were deemed essential to the U.S. They could have been  
12 simply very important scientists who wished to defect.

13 JUSTICE BREYER: Okay. So you would say this --

14 MR. BURMAN: They could have been any --

15 JUSTICE BREYER: Are -- are you claiming that  
16 your answer to Justice Souter's question is we will assume  
17 for purposes of this case -- we're not admitting whether  
18 it's true or not, but we're going to assume we're not  
19 spies --

20 MR. BURMAN: We believe --

21 JUSTICE BREYER: -- because we win even if we're  
22 not spies because we are essential persons?

23 MR. BURMAN: If we had made the Totten mistake  
24 of suing in our own name, we would be out of court, but we  
25 have sued as Does and we have said we are satisfied with



1 the CIA concluding internally whether we are entitled to  
2 PL-110 status.

3 JUSTICE BREYER: All right, but my guess is --  
4 well, he's pushed you and it sounds like it to me -- that  
5 the only basis on which you could say you were an  
6 essential person is that you're a spy.

7 MR. BURMAN: We don't --

8 JUSTICE BREYER: He's -- he's not a scientist.  
9 He's not a --

10 MR. BURMAN: Since they have not contested our  
11 PL-110 status until a somewhat desperate comment in the  
12 reply brief, we have never had to face this question  
13 because there has been no question that we are PL-110  
14 resettles, and that as long as we do not disclose our  
15 identity, which we've been careful not to do, unlike  
16 Totten, there is no state secret that is -- is at risk.

17 JUSTICE SCALIA: But if the question comes up,  
18 you're going to have to disclose the identity. I mean, if  
19 -- if it is controverted whether indeed you're -- you're a  
20 spy or not, then what do you do? Do you say, well, we'll  
21 -- we'll do it in camera? That's right? I mean, you --  
22 you think that -- that a United States district court has  
23 all of these security facilities available as Langley? I  
24 mean --

25 MR. BURMAN: We --

1 JUSTICE SCALIA: -- trust me, it doesn't.

2 MR. BURMAN: We do not believe that we have to  
3 have -- that we have to disclose anything to the district  
4 court to have standing as Does to seek a fair procedure  
5 within the CIA. At the time of Totten, the idea of having  
6 a Doe being able to sue was not recognized for a plaintiff  
7 who wanted to protect his identity. We have that now as  
8 of the last --

9 JUSTICE BREYER: Do we have to change Totten?  
10 Because, look, what I'm now thinking is, A, if you're  
11 suing on a contract, you win because you're a spy, if you  
12 win. If you're suing on promissory estoppel, you win  
13 because you're a spy, if you win. If you're suing on PL-  
14 110, you win because you're a spy, and if you're suing on  
15 due process, you win because you're a spy. So no matter  
16 what, you can't win unless you're a spy.

17 Now, they -- they have Totten, and it -- it --  
18 that sounds to me as if you're there. And do we have to  
19 overturn Totten for you to win?

20 MR. BURMAN: I do not believe so, but you should  
21 not expand Totten in the dramatic way the Government asks.  
22 And it does not counsel for you to expand Totten when they  
23 cannot define a clear line as to where this  
24 jurisdictional, which they use in the brief but abandon  
25 here -- they cannot explain to you why in Webster -- they

1 argued on pages 37 to 40 of their brief for exactly the  
2 same interpretation of Totten that they are arguing now.  
3 They specifically said that it should not be up to the  
4 courts to look behind the scene of the privilege in  
5 Reynolds, and yet the Court rejected that position.

6 In Hamdi, they said there cannot be a secret  
7 proceeding with due process and the courts cannot review  
8 whether we've made that available, and the Court rejected  
9 that.

10 Things have changed since the time of Totten.  
11 That does not require overruling Totten, but it certainly  
12 does not counsel expanding Totten in the dramatic way that  
13 the executive asserts, a way that basically says to the  
14 Court you have absolutely no role in determining whether  
15 our assertion that the state secret is an essential  
16 element here is in fact the case and whether it truly is a  
17 state secret.

18 We -- if there's anything we ought to be able to  
19 decide it's what our case is about. We may have loosely  
20 used bargain in the complaint, but the district court and  
21 the Ninth Circuit have now made it very clear that we  
22 cannot have a contract claim, we cannot have a due  
23 process, whether substantive or procedural, based upon a  
24 contract, we cannot have a promissory estoppel claim. The  
25 Ninth Circuit has decided all of that against us.

1                   What we still have, though, is a claim to a  
2   fair, internal agency procedure.

3                   JUSTICE GINSBURG:   Attached to what?   I mean,  
4   you can -- a fair procedure leading nowhere is not a  
5   claim.   You have a right to a fair procedure because it's  
6   attached to some substantive right.

7                   MR. BURMAN:   That's what we haven't yet had the  
8   opportunity to prove as to what it is in these  
9   regulations.   But if you would look at -- again, at the  
10   respondents' appendix 72 to 74, the agency's witness that  
11   they voluntarily made available, did not make any  
12   assertion of privilege, did not make any assertion that  
13   this was confidential asked, are there agency regulations  
14   that you know of that relate to the resettlement of these  
15   PL-110 people who are resettles from foreign countries?  
16   Yes.   Are there regulations that deal with the  
17   determination of the level and extent of benefits to be  
18   given resettles?   Yes.   And are there agency regulations  
19   that deal with grievances by resettles?   Yes.

20                   We think no minimal due process allows them to  
21   tell us the wrong standard and not to give us notice and  
22   an opportunity to be heard in a confidential proceeding --

23                   JUSTICE KENNEDY:   What's --

24                   JUSTICE GINSBURG:   You still have --

25                   JUSTICE KENNEDY:   -- what's your best case for

1     that?  What's your best case for that proposition?

2                 MR. BURMAN:  Well, certainly Matthews v.  
3     Eldridge.

4                 JUSTICE KENNEDY:  Because it sounds to me like  
5     due process in -- in the air.

6                 MR. BURMAN:  We don't believe it is, Your Honor.  
7     We -- we don't know for sure until we are entitled to  
8     litigate the regulation.

9                 JUSTICE KENNEDY:  No, no.  We know enough at the  
10    summary judgment stage for us to -- to decide whether the  
11    case can go forward or the dismissal stage.

12                MR. BURMAN:  Well, there has been no summary  
13    judgment --

14                JUSTICE KENNEDY:  Or dismissal stage.

15                MR. BURMAN:  At -- at the dismissal stage, our  
16    pleadings have to be accepted as true, and we believe that  
17    the pleadings sufficiently assert that there are  
18    regulations there that create a -- a property interest and  
19    that --

20                JUSTICE GINSBURG:  That create a property right?

21                MR. BURMAN:  Yes.

22                JUSTICE GINSBURG:  But the property right is the  
23    contract with the United States.  I mean, you can't get  
24    away from the contract by calling it a property right.

25                MR. BURMAN:  We do not believe there is a

1 contract and we do not believe we have to rely on it. We  
2 were -- the Does were coerced into what they did. They do  
3 not seek compensation.

4 JUSTICE STEVENS: But what is your strongest  
5 case? I don't think Matthews addresses it. What is your  
6 strongest case for the notion that you have a property  
7 interest even though you don't have a contract?

8 MR. BURMAN: Probably Perry v. Sindermann in the  
9 sense that there -- it was clear that the contract was  
10 over but the Court indicated that --

11 JUSTICE KENNEDY: Well, that was the firing of a  
12 school teacher. There was --

13 MR. BURMAN: It was a nonrenewal.

14 JUSTICE KENNEDY: -- there was -- there was an  
15 interest in having your job, contract property, and  
16 interest in getting back salary, contract property. Not  
17 this case.

18 MR. BURMAN: The -- what the Court actually, I  
19 believe, focused on there and in Goldberg v. Kelly was the  
20 question of whether there were regulations --

21 JUSTICE KENNEDY: Goldberg v. Kelly, welfare  
22 benefits, money.

23 MR. BURMAN: We believe this is in a sense the  
24 equivalent of a welfare benefit.

25 JUSTICE BREYER: Perry v. Sindermann. Is that

1 -- that's the nontenured teacher?

2 MR. BURMAN: Yes.

3 JUSTICE BREYER: There's no property right  
4 there, I don't think. I've always taught that as a ground  
5 that it wasn't compared to Roth where there was. All  
6 right. So -- so -- but there was a First Amendment  
7 interest of some kind.

8 MR. BURMAN: And I believe the Court indicated  
9 that it would be possible if there were practices and  
10 policies that had been established that set substantive  
11 standards for continuing that there would be a property  
12 right in a fair procedure for determining that internally  
13 at the school.

14 JUSTICE BREYER: You're probably right if they  
15 have -- I see what you're saying.

16 MR. BURMAN: We also believe there is a liberty  
17 interest. These people came to the U.S. in danger. The  
18 mere fact of labeling them essential to the United States  
19 and bringing them in in the PL-110 status, taking away  
20 their identity, giving them a false identity, false  
21 references, changing their occupations, all of those  
22 things we believe -- we have an argument -- created a  
23 liberty interest in continuation of the protection. It's  
24 the special relationship, the Dushane-type argument that  
25 the -- that the Ninth Circuit relied on.

1           But I would hasten to add it is premature to  
2     determine whether we win on the merits, and the Government  
3     is absolutely wrong in their brief in suggesting that  
4     unless we can prove at this point that we can win on the  
5     merits, that we don't have standing. We have standing to  
6     make a claim for fair procedures. Those procedures may  
7     include confirming internally to the CIA our identity and  
8     they may include confirming whether we satisfy whatever  
9     the need-based standard is that the CIA has identified.

10           We have made every possible effort to comply  
11    with the covenant that Totten imposed in a contract, a  
12    contract that we don't believe we have. We sued as Does.  
13    We have sought preapproval of every single filing. We had  
14    -- counsel that learned any confidential information were  
15    precleared by the agency. That is not what happened in  
16    Totten. Those are procedures, as Justice Scalia has  
17    suggested, that did not -- were not recognized at the time  
18    of Totten just like the due process claim was not  
19    recognized at the time of Totten. And it is a claim that  
20    can be done internally to the CIA.

21           JUSTICE KENNEDY: You think that Totten would be  
22    decided differently today because of the -- our due  
23    process jurisprudence?

24           MR. BURMAN: We believe that Totten didn't know  
25    to make a claim other than contract.



1 JUSTICE KENNEDY: I -- that's not my question.

2 MR. BURMAN: Yes, we do.

3 JUSTICE KENNEDY: Suppose Mr. Totten is here  
4 today.

5 MR. BURMAN: And if there were regulations in  
6 the Totten situation that created some sort of meaningful  
7 standard that would be applied by an internal procedure,  
8 which the record shows here the CIA has an internal  
9 procedure, not just regulations setting out the standard,  
10 but a review process. We simply want to have a fair,  
11 internal procedure.

12 This case really is not about the protection of  
13 state secrets, but the limits of the executive authority  
14 to unilaterally assert without any review by the court --

15 JUSTICE GINSBURG: How would the court -- a  
16 court go about monitoring this fair procedure --

17 MR. BURMAN: We -- we don't believe the court  
18 would have a role in monitoring the fair procedure. It  
19 would simply determine whether the procedure that the CIA  
20 has described in the court record already satisfied  
21 minimum standards of -- of due process. If the court  
22 found that it did not --

23 JUSTICE GINSBURG: And then you -- you said that  
24 -- suppose you knew what it was on paper and then you  
25 wanted to complain to a court, that's not what they gave

1 us. They said that in their regulations, but they gave us  
2 something much less.

3 MR. BURMAN: It's possible that the CIA would  
4 assert that there is some reason that it gave less than  
5 its regulations that would be a state secret. It's hard  
6 for us to imagine what that would be, but in fact that is  
7 open on remand for the -- for the CIA to argue that.

8 JUSTICE SCALIA: Do these regulations just set  
9 forth a procedure or do they set forth some substantive  
10 entitlement?

11 MR. BURMAN: They seem to do both. They -- we  
12 haven't, of course, seen them in full yet, but they set  
13 forth a procedure and then they also say that there is  
14 some sort of need, age, indigency, and health-based  
15 standard for continuing the support. And if you'll  
16 notice --

17 JUSTICE BREYER: Then it will be worse for them.  
18 I mean, they say, look, frankly we'd rather reveal the  
19 names of one or two spies than we would like to reveal our  
20 procedures for dealing with the spies we bring into the  
21 United States. It will take someone who reads those about  
22 15 minutes with a computer to locate 400 resettled spies.  
23 That will be a terrible disaster.

24 MR. BURMAN: If that was an external process,  
25 but we agree it should be internal to the CIA, that the

1 process for applying that standard must remain internal to  
2 the CIA. The Does share the interest in protecting their  
3 identity and the identities of others like them.

4 We -- we believe that the Government --

5 JUSTICE BREYER: What's your answer? What is  
6 your response?

7 MR. BURMAN: That there's no external -- there  
8 -- there will be no public knowledge of that information,  
9 that they can explain their -- they can apply their  
10 process internally, apply the need-based process  
11 internally, and that will not be litigated in the courts  
12 if they assert executive -- or state secret privilege as  
13 to that, and we assume that they would at that point. But  
14 we -- we agree --

15 JUSTICE SCALIA: But the court would say you  
16 don't have a cause of action unless it knows what -- what  
17 these regulations say. Surely the regulations have to be  
18 disclosed to the court at least.

19 MR. BURMAN: We -- we believe that's the case  
20 and they have not yet said that it would hinder the state  
21 secrets at all to disclose them, and they have disclosed  
22 quite a bit and said that the remainder they are holding  
23 back only a need-to-know basis. They have not asserted  
24 any state secret privilege with the remaining regulations.

25 And we know, in fact, from the letter that is in

1 the record from -- between the CIA and the Justice  
2 Department in which the -- there was basically an  
3 understanding that there would be regulations like this in  
4 order to make sure that these PL-110 resettles did not  
5 effectively become wards otherwise on -- on the Government  
6 and that the CIA would continue some responsibility for  
7 them.

8           The -- we are not aware of any case in which  
9 this Court has suggested that there is an obligation of  
10 the district court to look behind the use of Doe and  
11 determine in a public manner the identity of the person.  
12 That -- the Government seems to assume that they have some  
13 entitlement to have a self-inflicted harm that they would  
14 demand that the identity of the Does be disclosed publicly  
15 and that they're entitled to do that. We do not believe  
16 that that's a required part of the use of Does.

17           And in any event, we think it is somewhat  
18 similar to the criminal context where, if the Government  
19 is going to insist on moving forward in some way that is  
20 an affirmative defense like that, they may well have a  
21 responsibility for not being able to defend their position  
22 if they, at the same time, say that the state secret  
23 privilege applies. But at this point, anyway, that has  
24 not been presented to the district court.

25           We -- we find it strange that the Government so

1 quickly now says, unlike what it argued in Webster, that  
2 there is this type of contract which is not subject to the  
3 jurisdictional bar, and that is a contract with their own  
4 employees when they tell us that those same employees are  
5 going to know a much broader swath, as Mr. Clement said,  
6 of secrets. If their rationale made sense as something  
7 that was so compelling that the Court should create a  
8 jurisdictional bar for what the courts would otherwise  
9 have the capacity and the competence to do, you would  
10 think it would apply in that situation as well.

11 But the fact is they lost Webster, and so they  
12 have to try to say that there is something still very  
13 broad about Totten but explain away Webster, and they  
14 simply cannot convincingly do that. Webster was the same  
15 argument by them. Reynolds was the same argument by them,  
16 and they lost.

17 JUSTICE STEVENS: May -- may I ask you what is  
18 probably a stupid question? Why isn't the contract barred  
19 by the statute of frauds?

20 MR. BURMAN: Well, we haven't thought about that  
21 because we haven't proceeded on -- on the contract. There  
22 may well -- we -- it probably is.

23 JUSTICE STEVENS: Yes.

24 MR. BURMAN: And there -- we -- we -- but we do  
25 not proceed on the contract.

1           The Does, in fact, do not underestimate the  
2 risks of disclosure of their identities and of their  
3 relationship with the CIA. Perhaps they put too much into  
4 the complaint describing at some length what they did, but  
5 the reason for that, I suggest, is understandable. It was  
6 subject to preapproval by the agency. Why not put the  
7 equities in there even though they're not essential  
8 elements of your claim and see if the agency approves  
9 them? The agency approved them. We should not be thrown  
10 out of court because we put into the complaint allegations  
11 which the agency admits using the Doe, do not threaten any  
12 secrets, and which are not part of the essential elements  
13 of our claim.

14           JUSTICE SCALIA: Are all of these what you call  
15 110 resettles -- are they all CIA resettles?

16           MR. BURMAN: It does not appear that they are.

17           JUSTICE SCALIA: Some of them State Department  
18 and --

19           MR. BURMAN: At -- at least -- my understanding  
20 is at least the FBI and perhaps the Commissioner of INS at  
21 the time for -- perhaps at the request of other agencies.  
22 It appears that all three agencies had the ability to  
23 create this exception to the normal immigration procedure.

24           If the Does can show on remand that the CIA's  
25 regulations are as they allege and that PL-110 status

1 generally, which is what the CIA witness McNair basically  
2 said, that many PL-110 resettles are in continued danger  
3 because of the nature of which we brought them in,  
4 regardless of what they did before we decided to bring  
5 them in, or if they can show that in their particular  
6 situation there is a -- a special relationship of danger  
7 created, we believe we would have a substantive due  
8 process argument and a procedural due process argument.  
9 That is not today's question.

10 The Government has agreed that for purposes of  
11 today's question, it should be assumed that we can make  
12 out a due process claim. That claim is --

13 JUSTICE KENNEDY: I'm not quite sure where the  
14 Government has said that. You talk about footnote 2. All  
15 it said was that they're not appealing the point that you  
16 have to go to the Court of Claims.

17 MR. BURMAN: And also in footnote 1 in the -- in  
18 their brief on the merits to this Court. I think it's on  
19 page 7. My reading of that is that they are not  
20 challenging the due process analysis, and it would be  
21 premature to challenge the due process analysis at this  
22 time, which is what the Court said in Webster. We believe  
23 that our due process argument is stronger than the due  
24 process argument that was made in Webster, but the Court  
25 in any event said that's not what is -- what is before us

1 at this time. And -- and we believe that that's the same  
2 situation now.

3 JUSTICE STEVENS: Do you agree --

4 JUSTICE SCALIA: I'm just wondering what --

5 JUSTICE STEVENS: Excuse me. Do you agree your  
6 due process argument does depend on having either a  
7 property interest or a liberty interest?

8 MR. BURMAN: Yes.

9 JUSTICE SCALIA: I'm just wondering what's, you  
10 know, some foreign -- I don't know who -- who the Does  
11 spied on, but let's assume -- you say they're in danger.  
12 Somebody may be interested in -- in the subject. What  
13 kind of security provisions do you have in your law office  
14 that would -- that would make them immune from the kind of  
15 intrusion that foreign espionage services --

16 MR. BURMAN: In -- in general, we have not been  
17 allowed to take information outside of the agency. Even  
18 when the clear --

19 JUSTICE SCALIA: I'm not talking about the  
20 agency. Just about the name of your clients. I think  
21 it's -- there are countries interested in -- in, you know,  
22 who was spying on them.

23 MR. BURMAN: That was their decision to trust us  
24 with that, and ironically under the Government's theory of  
25 this case, the Does --



1 JUSTICE SCALIA: Well, but it may lead -- it may  
2 lead to other agents and -- and one of the problems about  
3 allowing suits like this is that this information about  
4 who the agents are will be brought to a lawyer, kept in  
5 his law office, and much more readily accessible to -- to  
6 foreign powers than -- than it would be at Langley.

7 MR. BURMAN: And under the agency's theory of  
8 this case, there is nothing that stops the Does from  
9 making their identities public because there is no  
10 enforceable contract that the agency can enforce. The  
11 agency wants to keep Snepp. It wants to live with  
12 Webster, and the only thing it has left is to somehow  
13 carve out a rule that applies to these people who have  
14 done everything they possibly could, including not telling  
15 me who they are.

16 Our files within our office do not identify them  
17 in writing, is my understanding, by name. I certainly am  
18 not aware of who they are. I know what's alleged in the  
19 complaint and nothing more than that.

20 But certainly the risk of gray mail, the risk of  
21 the Does -- people in the Does' position disclosing  
22 something is totally irrelevant to the question of whether  
23 Totten creates some sort of bar that applies not just to a  
24 contract claim but to a claim where there is no contract,  
25 where it is not alleged that it is based upon a contract,

1 and where the parties have done everything possible -- the  
2 Does, the plaintiffs, have done everything possible to  
3 honor the confidences that the Government wants to keep.

4 Thank you, Your Honors.

5 JUSTICE STEVENS: Thank you, Mr. Burman.

6 Mr. Clement, you have about 4 and a half minutes  
7 if you need them.

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Justice Stevens, just a few  
11 points. And may it please the Court, just a few points in  
12 rebuttal.

13 First of all, as I think Justice Kennedy's  
14 question indicated, there was no waiver of any due process  
15 argument. If you look at those footnotes, the only thing  
16 that's waived is the Tucker Act concern that we talked  
17 about earlier.

18 Second of all, I think in thinking about this  
19 PL-110 claim, it's important to acknowledge, as I think  
20 Justice Scalia was suggesting, that it is the PL-110 claim  
21 to the CIA. And as I understand their argument, it  
22 depends on their being a significant difference between  
23 coming into court and saying I'm an unacknowledged spy and  
24 I'd like to sue the CIA and coming into court and saying I  
25 am an unacknowledged PL-110 resettlee with a claim against

1 the CIA, please hear my claim. I would say there's no  
2 material difference in terms of all of the policies that  
3 undergird the Totten doctrine between those two. And I  
4 would note that even the Ninth Circuit recognized at 35a  
5 and 37a of the petition appendix that the respondents  
6 would have to establish a relationship with the agency.

7 The final two points I would make is, first of  
8 all, they would like to make some benefit of the fact that  
9 they are suing as Does as opposed to the Totten case. I  
10 would make two points about that.

11 First of all, presumably the reason that William  
12 Lloyd could use his name in the Totten case is because it  
13 was a suit by his estate and he was deceased, so he didn't  
14 have a concern about retaliation.

15 (Laughter.)

16 MR. CLEMENT: I would also say that the  
17 difference between suing under Doe and suing under your  
18 name just makes clear that both sides to this litigation  
19 start with the premise that the fundamental fact of this  
20 litigation turns on a secret. They don't want their name  
21 revealed any more than we want the name revealed, and that  
22 just underscores how this is all about a secret, just as  
23 in Totten.

24 The last point I would make is they asked you to  
25 take their pleadings as a given at this stage in the

1 litigation, and I would ask you to look at those  
2 pleadings. The complaint is replete with references to  
3 the espionage relationship, and the complaint itself cites  
4 Totten or the Totten doctrine no less than seven times. I  
5 would suggest that if this claim is not Totten-barred,  
6 then no claim is.

7 With that, I'd ask the court below be reversed.

8 JUSTICE STEVENS: Thank you.

9 The case is submitted.

10 (Whereupon, at 12:01 p.m., the case in the  
11 above-entitled matter was submitted.)

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